

BEFORE THE PRESIDING DISCIPLINARY JUDGE

IN THE MATTER OF A MEMBER OF
THE STATE BAR OF ARIZONA,

DAVID J. WOLF,
Bar No. 012946,

Respondent.

PDJ-2017-9011-PV

**ORDER EXTENDING
PROBATION**

[State Bar No. 17-0187-N]

FILED MARCH 3, 2017

On January 31, 2017, the State Bar filed pursuant to Rule 60(a)(5)(C), Ariz. R. Sup. Ct.¹ a Notice of Respondent's Noncompliance with Probation (Notice). It was alleged Mr. Wolf breached the terms of his probation because of his testing positive for methamphetamine.

On February 21, 2017 the States Bar moved for the telephonic appearance and testimony by witnesses Donna Wagner and Stanley Callister, M.D. On February 24, 2017, Mr. Wolf moved for the telephonic appearance and testimony by his witnesses, Edgar Pacheco and Marizza Pacheco. Marizza Pacheco does not speak fluent English. Mr. Wolf accordingly had present at the hearing a certified translator to interpret.

¹ Unless stated otherwise, all rule references are to Ariz. R. Sup. Ct.

On February 28, 2017, the PDJ ruled that under Rule 58(j)(4), telephonic witness testimony should normally be permitted when there is evidence the witness is unavailable to testify in person. Under Rule 60(a)(5)(C), there is no such restriction. Under Rule 48(c), the Rules of Evidence shall be followed as practicable.

The PDJ found the motions for telephonic testimony afford the Respondent the ability to cross-examine the witnesses. Provided the evidence is reliable, evidence not legally privileged, including hearsay, would likely be admissible in such probation violation proceedings. Both motions were granted.

The proceeding was heard on February 28, 2017. David L. Sandweiss appeared on behalf of the State Bar. David J. Wolf appeared representing himself. The burden is upon the State Bar to prove the alleged violation of probation by preponderance of evidence. Eight exhibits were offered and admitted without objection. Mr. Wolf and Dr. Callister gave testimony. Mr. Wolf further stated the testimony offered by his two witnesses. The State Bar did not oppose the avowal and waived cross examination.

Findings of Fact

Mr. Wolf committed the criminal offenses of DUI-drugs (methamphetamine) and possession of narcotic drugs (cocaine). Mr. Wolf was suspended from the practice of law in Arizona under an agreement for discipline by consent. *See* Rule 57. The hearing panel recommended reinstatement after formal reinstatement

proceedings in File No. PDJ-2014-9035. By order dated May 19, 2016, the Supreme Court reinstated Mr. Wolf to the practice of law. [Ex. 1.] Mr. Wolf was placed on probation for two years under stated conditions. Those conditions required Mr. Wolf abstain “from ingestion of mind-altering substances during the period of probation.” [Ex. 1, SBA 000001.]

That Mr. Wolf ingested and tested positive for methamphetamines is undisputed. On November 21, 2016 at 14:03, Mr. Wolf submitted a urine sample to be tested. The lab result tested positive only for Amphetamines. [Ex. 2.] This positive test was because of his use of Adderall by prescription. [Exhibit 5.]

Mr. Wolf was ordered to submit to a random urine screening test on November 30, 2016. He tested positive for both amphetamines and methamphetamines. [Ex. 3.] His creatinine level was normal, which excludes extreme dilution by Mr. Wolf. The specimen was re-examined by a scientist to assure validity which confirmed methamphetamines were ingested by Mr. Wolf. [Exhibit 4.] The testimony and Exhibit 6, confirm that the Adderall did not alter the test results.

Ms. Yvette F. Penar is the compliance monitor in the lawyer regulation office for the State Bar. She has been monitoring Mr. Wolf since May 19, 2016, the date of his reinstatement. Upon receiving the notification of his positive methamphetamine test, she communicated with Donna Wagoner, the Chief Operating Officer of the testing company. According to Ms. Wagoner, Mr. Wolf

attributed his positive result to the use of a nasal decongestant. Ms. Penar then requested a confirmatory test be conducted to determine the drug levels found in Mr. Wolf. [Exhibit 8.] She reported Mr. Wolf told his psychiatrist he tested positive because he accidentally drank “his lady friend’s coffee” which was laced with methamphetamine to aid in her weight loss. [Exhibit 7.]

The letter from Dr. Meyer states Mr. Wolf reported Mr. Wolf telling him “that prior to the drug test he’d been visiting some friends in Mexico and reports that the woman he was visiting was using methamphetamine for weight loss and was drinking it with her coffee.” Mr. Wolf reported to him “he’d accidentally drank the coffee which she’s poured for herself which contained the methamphetamine.” [Exhibit 5.]

Dr. Callister in his testimony confirmed his findings. Mr. Wolf testified he had been visiting friends in Mexico, Edgar Pacheco and his wife Marizza Pacheco. He went to their house, she had poured herself a cup of coffee and unbeknownst to him, she put methamphetamines in the coffee to help her lose weight. Mr. Wolf swears he was unaware of his ingesting methamphetamines and necessarily was submitting that he was unaffected by his consumption by such testimony. Mr. Wolf apologized profusely.

Discussion

The State Bar recommended suspension of six months and one day. Mr. Wolf acknowledged the error and his unknowing association with an individual using methamphetamine. The scenario testified to by Mr. Wolf is difficult to accept. He testified Ms. Pacheco had poured herself a cup of coffee before he arrived, laced it with methamphetamines and momentarily left the room. Mr. Wolf went to this friend's house next door and seeing the cup of coffee on the table drank it while no one was in the room and prior speaking to anyone.

Attorney discipline is rehabilitative. Imposing probation in disciplinary proceedings is not token punishment. The sanction Mr. Wolf was suspended for involved three separate counts, two involved his work as a lawyer, the third was for his DUI-methamphetamines, a class 1 misdemeanor and possession of cocaine, a class 4 felony. The latter rightly assured his suspension under Rule 61.

Mr. Wolf use of methamphetamines leading to his suspension was for a prolonged period. While he should have known its dangers, he minimized this in prior proceedings because in his view, he was never addicted. Hopefully whatever mental blocks he built to see himself in such a subjective light have now crumbled or fallen down. His possession of cocaine was a felony. His use of methamphetamine while driving was a misdemeanor and likely endangered others traveling the same road near him.

As a rehabilitative program, probation aids in the objective measurement of the individual. If a probationer fails or refuses to participate, the issue narrows to a greater focus on the risk to the public and the profession. This assures strong sanctions. When one fails a term of probation that they are participating in, there is a greater failing of oneself. The sanctions may be the same. But the analysis must be different. By example, if there is an alleged violation of the ERs related to the practice of law, the focus concentrates on the new violation. If established, the *Standards* determine the response and the probation becomes an aspect of aggravation.

No small part of any probationary period is to observe and assist in reducing the incidence and impact of the behaviors of a respondent that violate crimes, policies, or rules, including ethical rules. No individual has a right to probation. Lawyers hold a unique position in the law. Their actions and inactions impact the public's view, not only of the profession, but of justice, the need for law or even an orderly society. In that perspective, the active use of methamphetamine not only destroys the lawyer, but also damages the profession and the public's perception of the profession.

Because the analysis remains on the rehabilitative purpose of lawyer discipline, the methods, means and manners of the use of methamphetamine must be evaluated. Otherwise the term of probation is not rehabilitative. The analysis of

what to do because of Mr. Wolf violating his term of probation typically centers on basic principles.

1. Was the respondent accountable? Mr. Wolf questioned whether the test was accurate. That is a non-factor. However, once confirmed Mr. Wolf has held himself accountable, acknowledged his error and regardless of the plausibility of his explanation, recognized and “owned” the error. He took the violation seriously and was remorseful. The person who does not take remorse seriously, does not take the violation seriously. The opposite is equally true.

2. Is the respondent burdened by the violation? Mr. Wolf confessed his deep regret and expressed sorrow for his violation. He acknowledged the violation as a breach in his integrity and committed himself to restoration. He focused on the wrong he did and kept his gaze there.

3. Did the respondent gain meaningful insight? Multiple ethical stumbling arises when an attorney goes through life on autopilot, as though their eyes were closed. It is the anomaly of looking but not seeing or observing the surface but negligently or eventually knowingly omitting what is underneath. Issues lose focus. In such a state, sight is present but perception is lost. If true, Mr. Wolf visited Mexico, walked into a neighbor’s house and while no one was in the room, before he had greeted anyone, drained a cup of coffee when he had no understanding of

whose cup he was drinking from. Insight is gained from life's experiences or ignored. It appears Mr. Wolf gained awareness and some meaningful insight.

4. Is it likely respondent will violate probationary terms again? Mr. Wolf did not try to bargain his way out of his violation. He rightfully pointed to the evidence of his proven long history of sobriety rather than conclusory allegations comprising plenteous platitudes. His record of proven sobriety was the most dependable testimony in the hearing he offered.

Mr. Wolf made no entitlement arguments. By acknowledging his violation and concentrating on issues as outlined above, Mr. Wolf avoided any distraction from the focus of probation; rehabilitation. Using drugs is an expensive substitute for reality. An insightful blink can come from the stark evaluation of self-examination. A blink is infinitely better than blindness to reality. There are few individuals free from things they are ashamed of. In proceedings such as these, acknowledgement of the challenges of sobriety aids any judge in balancing what to do next. Mr. Wolf made a slip, not a fall. Two slips can equate to a fall. He should govern himself accordingly.

IT IS ORDERED Mr. Wolf shall remain on probation for two (2) additional years on the same terms and conditions of probation with the additional term of

probation to include quarterly hair follicle testing.

DATED this 3rd day of March, 2017.

William J. O'Neil

William J. O'Neil, Presiding Disciplinary Judge

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